

REST IN PEACE—OR THY WILL BE DONE

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The author's vast experience permits him to skillfully reveal the legal and practical nuances of will contest actions. He identifies the numerous problems confronted in Ohio in a will contest action and sets forth proposals on how these difficulties can be avoided or minimized.

The aim of this article is to make the reader aware of the obstacles which confront him in the filing of a will contest action, as well as how to by-pass these obstacles by effectuating a settlement through proper preparation and investigative techniques. Toward this end, the following points are considered: (1) the type of interest necessary to qualify in Ohio as a plaintiff in a will contest case; (2) the evaluation of the contestant's case through the use of discovery techniques; (3) the use of information obtained in discovery in conjunction with obtaining an "agreement not to contest;" and (4) the procedural and technical pitfalls which abound under Ohio law in the institution of a will contest case, with particular emphasis being placed upon the proper joinder of all parties.

I. CAN YOUR CLIENT FILE A CONTEST?

A. Statutory Provisions

The first inquiry one must make in determining whether to handle a possible will contest case is whether his prospective client has the statutory qualifications to be plaintiff. The right to contest a will is conferred only on a person interested in a will or codicil admitted to probate.¹ It follows that where a plaintiff is not an interested person within the context of Ohio Revised Code section 2741.01, any judgment setting aside the will is void *ab initio* for lack of jurisdiction.²

B. Requirement of Direct Pecuniary Interest in Decedent's Estate

1. General Application of Rule

In *Bloor v. Platt*,³ the Ohio Supreme Court defined an interested person as follows:

Any person who has such a direct, immediate and legally ascertained pecuniary interest in the devolution of the testator's estate as would

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¹ Ohio Rev. Code Ann. § 2741.01 (Page 1953).

² *Donovan v. Decker*, 98 Ohio App. 183, 122 N.E.2d 501 (1953).

³ 78 Ohio St. 46, 84 N.E. 604 (1908).

be impaired or defeated by the probate of the will, or be benefited by setting aside the will, is 'a person interested.'⁴

Patently, an interested person includes a next-of-kin who would inherit under the law of intestate succession if the probated will were declared invalid,⁵ as well as a beneficiary under a prior unprobated will.⁶

Less obvious are the rights of the guardian of a mentally incompetent person, a judgment-creditor of an heir, the successors in interest of a decedent's estate, and the State of Ohio.

In *In re Kowalke*,⁷ it was held that it is the duty of the guardian of a mental incompetent to determine whether reasonable grounds exist for contest of any will under which the ward receives substantially less than he or she would receive as an heir-at-law, and, upon making such determination, to institute and maintain a will contest on behalf of his ward.⁸

In *Bloor v. Platt*,⁹ the decedent devised her estate in trust for the benefit of her only heir, a spendthrift son. The purpose of the trust was to defeat the rights of the son's judgment creditors. Shortly after the decedent's death, one of these judgment creditors levied on lands owned by the decedent and then proceeded to file an action to contest the decedent's will. Upon demurrer by the son, the supreme court held that the lienholder was an interested person, because his interests would prevail in the event the will was set aside.¹⁰

Since the right to contest a will is a property right, and not a mere personal privilege, this right survives the death of the testator's child and passes to the child's personal representative or heirs-at-law.¹¹

Can the prosecuting attorney, on behalf of the state, file a will

⁴ *Id.* at 49-50, 84 N.E. at 605.

⁵ *Adams v. Gurklies*, 88 Ohio App. 225, 91 N.E.2d 706 (1949); *Wilson v. Wilson*, 8 Ohio App. 258 (1917).

⁶ *Kennedy v. Walcutt*, 118 Ohio St. 442, 161 N.E. 336 (1928). However, a beneficiary under the probated will has no right to contest unless he has some other legal interest in the estate. *Leedy v. Cockley*, 14 Ohio C.C.R. (n.s.) 72, 22 Ohio C. Dec. 299 (Cir. Ct. 1911).

⁷ 80 Ohio App. 515, 76 N.E.2d 899 (1946).

⁸ Statutory authority for the prosecution of such action is found in Ohio Rev. Code Ann. § 2111.14 (Page 1953).

⁹ 78 Ohio St. 46, 84 N.E. 604 (1908). *Accord*, *Herbster v. Pincombe*, 10 Ohio App. 322 (1918) (judgment-creditor of decedent's son was plaintiff).

¹⁰ The *Bloor* case was decided prior to the enactment of Ohio Rev. Code Ann. § 2105.06 (Page 1953), whereby a competent adult can renounce an intestate succession. Under this statute, it appears that a debtor, by renouncing his interests under the law of intestacy, could defeat the right of a lien creditor to contest a will under which the debtor was a beneficiary.

¹¹ *Chilcote v. Hoffman*, 97 Ohio St. 98, 119 N.E. 364 (1918).

contest action where the decedent left no next-of-kin in order to promote an escheat to the state? In the only reported Ohio case dealing with this question, a common pleas court answered in the negative.¹² The court reasoned that the statute of descent and distribution does not place the State of Ohio within the category of an heir; hence, the state could not be a "person interested" within the meaning of Ohio Revised Code section 2741.01 (G.C. section 12079) and has no right to file a will contest action.

2. Estoppel to Contest; the Doctrine of Election

If your prospective client is a legatee or devisee under the will which is the subject of contest, inquiry must always be made as to whether he has accepted any benefit given to him by the will. Clearly, an interested party may lose his right to contest a will by electing to receive benefits given him under the will.¹³ "It is the moral, economic rule, and the rule of written law that one cannot both eat his cake and have it."¹⁴

(a) *Bequests of Personalty*

As to bequests of personal property, courts have taken apparently conflicting positions with regard to whether, in the absence of fraud, a tender back of the bequest can be made so as to revoke the election. This conflict is explained when the cases are analyzed in view of whether or not the will contained an *in terrorem* clause. In *Spangler v. Beare*,¹⁵ the plaintiff had accepted a legacy of four thousand dollars, which acceptance was set up in the answer as a special defense. The plaintiff then tendered the funds back to the executor, and also replied that receipt of the legacy had been procured by fraud. The court held that even if the acceptance had not been procured by fraud, the acceptance of the legacy could be revoked and the money returned so as to reinstitute the right of plaintiff to sue. Four years later, the supreme court in *Kelley v. Hazzard*,¹⁶ held that tender back of a legacy is not a condition precedent to bringing an action to contest a will if the tender back is made *before trial*. By way of dictum, the court in *Kelley* suggested that a tender back is unnecessary if the party chargeable with the tender would, upon prevailing in the will contest, receive at least as much as he then had in his possession.

¹² State *ex rel.* Rich v. Page, 33 Ohio L. Abs. 647, 20 Ohio Op. 155 (C.P. 1941).

¹³ Patterson v. Atkinson, 7 Ohio App. 495 (1917).

¹⁴ Bender v. Bateman, 33 Ohio App. 66, 70, 168 N.E. 574, 575 (1929).

¹⁵ 2 Ohio App. 133 (1913).

¹⁶ 96 Ohio St. 19, 117 N.E. 182 (1917). Surprisingly, the *Spangler* case was not discussed by the supreme court in *Kelley v. Hazzard*.

If the will contains a provision to the effect that anyone who should contest the will loses his legacy, the doctrine of estoppel by acceptance is more firmly applied. It appears clear that in such a case, the tender back, if allowed at all in the absence of fraud, must be made before suit is instituted.¹⁷ In both the *Kelley* and *Spangler* cases, the will did not contain an in terrorem clause.

(b) *Devise of Real Property*

Where there is an acceptance of a devise of real property, no tender back is possible unless there is a positive allegation of fraud or misrepresentation. This rule appears to apply regardless of whether the will contains a forfeiture clause.¹⁸

3. Lack of Direct Pecuniary Interest

In many situations, the prospective client will have an interest in the decedent's estate, but this interest will not be legally sufficient to enable the client to maintain a will contest action.

(a) *Executor Under Prior Will*

For example, a person named executor under a prior unprobated will does not have the requisite pecuniary interest to contest a will executed later in time. An executor's right to a fee is a right to payment for services rendered, which is clearly distinct from a pecuniary interest in the devolution of the decedent's estate.¹⁹

(b) *Illegitimate Children*

The Ohio Supreme Court has decided two rather unique cases dealing with the rights of illegitimate children to contest wills. In *Blackwell v. Bowman*,²⁰ A had designated B, his illegitimate son, as his heir-at-law.²¹ A passed away. Subsequently, C, the brother of A, also passed away. It was held that B, the designated heir, had no right to contest the will of C because as a designated heir, he stood as a child

¹⁷ *Bender v. Bateman*, 33 Ohio App. 66, 168 N.E. 574 (1929); *Zinn v. Ferris*, 27 Ohio Dec. 27 (C.P. 1910), *aff'd* 88 Ohio St. 555, 106 N.E. 1087 (1913). In the *Bender* case the court intimated that if the will contained a forfeiture clause, no tender back could be made in the absence of fraud. However, no offer was made to return the bequest, so that this statement was clearly dictum.

¹⁸ *Spangler v. Beare*, 2 Ohio App. 133 (1913); *Leedy v. Cockley*, 14 Ohio C.C.R. (n.s.) 72, 22 Ohio C. Dec. 299 (Cir. Ct. 1911).

¹⁹ *Hermann v. Crossen*, 81 Ohio L. Abs. 322, 160 N.E.2d 404 (Ct. App. 1959).

²⁰ 150 Ohio St. 34, 80 N.E.2d 493 (1948).

²¹ See Ohio Rev. Code Ann. § 2105.15 (Page 1953) as to the procedure for the designation of an heir.

only to A, the declarant, and was no relation to the declarant's family.²² If the right of plaintiff to maintain a will contest action is placed in issue by defendant, the court without a jury should try this question. Hence, in *Comer v. Comer*,²³ it was held that the trial court properly dismissed a will contest action brought by the illegitimate son of the decedent where the evidence on the preliminary hearing showed that although the decedent had married the child's mother and acknowledged the child as his own, he was not, in fact, the father of the plaintiff.

(c) *Surviving Spouse*

In a case of first impression in Ohio, the decedent had three children and his surviving spouse filed a will contest action. It was held that:

[A] surviving spouse should not be permitted to resort to the costly and time consuming action to contest a will when the same result can be accomplished by the simple method of electing not to take under the will of the decedent.²⁴

Since the wife was contesting as an heir-at-law, she would receive one-third of the estate if the will was set aside. Obviously, the same result would be accomplished by electing against the will pursuant to Ohio Revised Code section 2107.39.

II. DISCOVERING THE MERITS OF YOUR POSITION

A. *Avoidance of a Directed Verdict as a Standard for Evaluation*

Having first established that the prospective contestant has the legal right to file a will contest action, the attorney must next ascertain whether or not the case has substantial merit. In essence, the attorney should be intellectually and legally satisfied that he is not filing a "nuisance case." The standard to be applied in making this evaluation is whether sufficient evidence can be produced to avoid a directed verdict. The statute specifically provides that "the order of probate is prima-facie evidence of the attestation, execution and validity of the will or codicil."²⁵ Hence, the trial court is required to direct a verdict sustaining the will when the evidence introduced by the con-

²² Clearly, since the designation of an heir-at-law is a unilateral action, the declarant could not contest the will of his designee.

²³ 175 Ohio St. 313, 194 N.E.2d 572 (1963).

²⁴ *Klicke v. Uhlenbrock*, 94 Ohio L. Abs. 402, 406, 200 N.E.2d 497, 499-500 (C.P. 1964).

²⁵ Ohio Rev. Code Ann. § 2741.05 (Page 1953).

testant does not overcome the prima facie case established upon probate of the will.²⁶

In order to evaluate the case in terms of a directed verdict standard, the attorney must put himself in the position of a judge. He cannot harbor the same emotional bias as his prospective client. For example, the clients will approach their attorney and say that their father must have been a raving lunatic when he made his will. "Why do you say this?" counsel will ask. The invariable reply is simple. "Because he left his entire estate to our stepmother," they say. Children feel that they cannot be excluded from their parents' wills. Morally they may be correct, but legally they are not. Of course, in such a situation the case will *never* get to the jury.

The principle can be best demonstrated by a case in which the referring attorney told me that a man had left his entire estate of 1,600,000 dollars to his second wife. The gentleman had three children. The will was executed about three months before he died. The man was then sixty-five years of age and had been married two years. Strangely enough, his second wife was a woman twenty-three years of age, and it was said that the decedent had died as a result of a heart attack while doing the "twist." This will looked as though it would be readily subject to a contest. But the decision of whether to contest the will was deferred until after conferring with the decedent's three children. Upon meeting these ladies, my first impression was that their demeanor, conduct and general bearing would make them ideal plaintiffs in a will contest case—provided that the case was strong enough to get to a jury. They were asked to describe their father, so as to permit ascertainment of whether the father had testamentary capacity under the rule of *Niemes v. Niemes*.²⁷

From their description it was learned that their father had been a C.P.A. for some forty years, and had inherited the major portion of his estate from his first wife, the prospective clients' mother. He had remained single for about a year and a half after her death. The decedent knew his children and visited them frequently. Thus their father recognized "the natural heirs of his bounty."

In regard to whether or not he knew the extent of his estate, one daughter then volunteered that he knew not only the extent of his own estate, but that he knew the extent of each one of their estates. Their father had prepared each of their income tax returns up to the time of his death. Of course, knowing this, there was no need to raise the question as to whether he was aware of their claim upon his bounty.

²⁶ *Andes v. Shippe*, 165 Ohio St. 275, 135 N.E.2d 396 (1956).

²⁷ 97 Ohio St. 145, 119 N.E. 503 (1917).

Turning to the subject of undue influence, the ladies were asked whether their father was dominated by their stepmother. The reply was as follows:

My father was the type of person who if he didn't want to do something he would put his heels in the rug and no one could move him, neither my mother, any of us girls, the grandchildren, nor the stepmother. Dad had his own way and was a controller of his own destiny.

From all that was revealed in the conversation with the decedent's daughters, clearly there was no possibility of a successful contest.

At the other end of the spectrum, if a probate court had appointed a guardian of the decedent's estate because the decedent was under mental disability, and during the pendency of the guardianship the decedent had executed a will, the court could not direct a verdict for the defendant. The adjudication of insanity creates a rebuttable presumption of continued incompetence,²⁸ which not only overcomes the presumption of due execution and validity which arises from the order probating the will,²⁹ but also shifts the burden of going forward with the evidence to the defendants.³⁰

B. *Tools of the Attorney in Evaluating His Position*

Realistically, most cases are not this simple to analyze or evaluate in terms of the directed verdict standard. Proof of lack of testamentary capacity is generally based on cumulative evidence of various disabilities. Two important methods of discovery in order to determine the merits of a case are the taking of long form testimony of the witnesses,³¹ and the use of an independent investigator.

1. Long Form Testimony of the Witnesses

Upon the filing of an application to probate a will, notice must be given to the

surviving spouse and to the persons known to the applicant to be residents of the state who would be entitled to inherit from the testator under sections 2105.01 to 2105.21, inclusive, of the Revised Code, if he had died intestate.³²

²⁸ Kennedy v. Walcutt, 118 Ohio St. 442, 161 N.E. 336 (1928); Potts v. First Central Trust Co., 37 Ohio L. Abs. 382, 47 N.E.2d 823 (Ct. App. 1940).

²⁹ Ohio Rev. Code Ann. § 2741.05 (Page 1953).

³⁰ Kennedy v. Walcutt, 118 Ohio St. 442, 161 N.E. 336 (1928). It should be pointed out that the appointment of a guardian of the person does not alone raise a presumption of incompetency. Roderick v. Fisher, 97 Ohio App. 95, 122 N.E.2d 475 (1954).

³¹ See Ohio Rev. Code Ann. § 2107.14 (Page 1953).

³² Ohio Rev. Code Ann. § 2107.13 (Page 1953).

If your client is one of these persons to whom notice must be given, or is otherwise an interested person, he has the absolute right to compel the attendance of any witness to the will for purposes of cross-examination.³³

For several reasons, the importance of this right cannot be over-emphasized. The attorney for the prospective contestants might be satisfied after cross-examining the attesting witnesses that he could not produce sufficient evidence to prove lack of testamentary capacity. By way of example, if the witnesses are persons well known in the community and of unimpeachable integrity, the attorney would know that they would never witness a document where there was a possibility that the testator was not of sound mind and memory or was under restraint. Similarly, if the witnesses are the testator's physician, attorney or clergyman, the possibility of a successful will contest is indeed remote.

Since the taking of long form testimony is a discovery procedure, the attorney should cross-examine the witnesses with a view toward finding out exactly what happened when the will was executed. In most cases the recitations in the attestation clause of the will serve to guide and support the witness. He will testify in accordance with the attestation clause. Therefore, it generally serves no useful purpose to ask the witness whether he was in the presence of the other witness and the testator when the will was executed. Instead, inquiry should be made regarding all of the circumstances surrounding the execution of the will which are not set forth in the attestation clause.

In this respect, the attorney for the prospective contestant should ask for a separation of the witnesses he is going to cross-examine. In many situations the witnesses will force their memories with the result that the testimony is conflicting and ambiguous.

In one situation, one of the witnesses confused the time when she had witnessed a deed for the decedent with the time she had attested the decedent's signature to the will. Her testimony was entirely at variance with that of the other witnesses and a settlement was immediately negotiated.

An often overlooked aspect of long form testimony is that the contestant may have no other opportunity to cross-examine the witness to the will. The proponent is not required to call the witnesses for direct examination at trial.

On the other hand, the attorney for the prospective contestant must not look upon cross-examination of the witnesses as a procedure to be used in every situation. The value of cross-examination must be

³³ Ohio Rev. Code Ann. § 2107.14 (Page 1953).

weighed carefully. To illustrate, recently the attorney for the proponent had the two witnesses to the will give their testimony in short form (merely a statement to the deputy in probate court). Prior to the probate of the will, the contestants, who were next-of-kin, demanded the testimony in long form. For the first time, the attorneys for the proponent discovered that the two witnesses were in their eighties, that they were both keen and alert, and because they had not often acted as witnesses, the execution of the will was such a memorable occasion that they remembered every detail. These two witnesses had been neighbors of the decedent for thirty-five years, and gave such important, vital and personal testimony that in a trial it would have been difficult for a jury to deny that the testator had testamentary capacity. They proved such excellent witnesses that they discouraged an otherwise possibly successful contest. Their testimony was reduced to writing and filed in the records of the court, and could have been used at trial in the event the witnesses were deceased or under mental disability. Short form testimony would not have had such a precluding effect as to the testamentary capacity of the testator and the due execution of the will, because it merely would have recited that the testator was of legal age, sound mind and memory and not under restraint. Without the long form testimony, it might well have been difficult for the proponent to succeed in sustaining the will, because the testator, in a will prepared three months before his death, had disinherited collateral heirs in favor of close friends. Medical testimony could have been secured by the contestants which might have permitted the case to be submitted to the jury. As the result of long form testimony, the contestants really had done a service for the proponents of the will.

2. The Independent Investigator

In conjunction with the discovery procedure under Ohio Revised Code section 2107.14, the attorney for the prospective contestant should begin immediately to compile and evaluate evidence relative to the proposed action. Promptness in such investigation is mandatory. In many cases, as previously illustrated, the facts are in truth other than those related to the attorney by an over-eager client.

In one case, the attorneys had positive evidence that a will was executed five days before the testator died. The prospective contestants maintained—and truthfully so—that the decedent had been an alcoholic for twenty-two years prior to his death. They had the names of the various sanatoriums and workhouses to which he had been committed or confined. In fact, the contestants' attorney knew from his

own personal knowledge that the decedent was referred to as the "town drunk," and the attorney almost determined to file the contest without any investigation. The preliminary investigation disclosed that the testator, eight weeks before drafting his will, had become a member of Alcoholics Anonymous and had been actively engaged in its work. It revealed that he had attended numerous meetings of the organization, at which he had given testimonials; that he had completely abstained from intoxicants; and that he had discussed his problem and his reformation with many people of unimpeachable integrity who would make excellent witnesses against the contestants. Moreover, they had all given statements verifying the testator's soundness of mind and memory and his desire that the named beneficiary be the recipient of his sizeable estate. In fact, the doctor who signed the death certificate and who had been a physician for many years, suggested that a sudden withdrawal from the use of alcohol might well have been the actual cause of the testator's death. Suffice to say, there were no proper grounds for a contest, and the attorney was able to avoid the embarrassment of filing a nuisance action.

The investigation should be conducted by an independent investigator, not by the attorney himself. First, the attorney's time is his stock in trade, and it is generally too valuable to be used for investigative purposes. Second, the witness may at some future date contradict the statement she made by saying that the attorney "put words in her mouth." Third, and most important, the attorney does not investigate objectively. He looks at the situation with a view toward finding out only that which will help him in an effort to build up his case.

Advocates who continually serve in investigative capacities, either by choice or as a delegated responsibility, are often easy prey for a common malady known as 'the county attorney's syndrome.' Faced with persistent pressure for results from their work, they are forced to develop cases by induction rather than by deduction. They reason from a conclusion toward a logical basis for it, rather than developing the conclusion from facts adduced during the investigation.³⁴

Ideally, the attorney should not disclose to the investigator the position he is taking in the matter at hand. The attorney cannot evaluate his position unless he has impartial accurate information. The attorney must direct the investigator to elicit information relative to the legal tests for insanity or undue influence as the case may be. The milkman may be the person who knows that the testator could

³⁴ Meier, "The Advocate as Investigator," 50 A.B.A.J. 835-36 (1964).

not remember the names of his children or that the testator did not know the nature or extent of his property.

Proper investigative techniques suggest the reduction of the witnesses' oral statement to writing, with each page being initialed and dated by the witness. As a precaution, a statement should contain a declaration that the witness signed it of his own free will, without threat, coercion, or offer of reward on the part of the investigator.

Even though the statements cannot be introduced into evidence to prove the truth of the facts contained therein, they do serve a two-fold purpose. First, the attorney can evaluate his case for trial purposes; second, accurate statements are invaluable in effectuating a settlement.

III. ATTEMPT SETTLEMENT BEFORE FILING A LAWSUIT

A. *Use of Charts*

Convinced of the merits of his case and possessed of the information obtained through the discovery devices of the long form testimony of the witnesses and proper investigation, the attorney is ready to prepare a chart as the final tool in reaching a settlement. The chart in a will contest case is a visual aid device, designed to give his opponent an idea of the strength of his position without revealing directly the sources of his information. In essence, the statements of the witnesses are categorized and compiled under headings such as "impairment of memory," "lack of knowledge of next-of-kin," and the like. The chart will indicate the frequency of acquaintance of the decedent with his witness, but it will not reveal the witness' name.

Armed with such a chart, the attorney is ready to face opposing counsel to the end that a settlement can be reached which is fair to all concerned and which will avoid costly and time consuming litigation.

B. *Technique in Negotiating a Settlement*

If a will is set aside by the jury, the work of the attorney for the contestant will inure to the benefit of all interested persons, whether or not represented by counsel.³⁵ Hence, in many situations, several of the heirs-at-law will attempt to secure the benefits of litigation without any burden to them. The answer to the problem caused by

³⁵ *Powell v. Koehler*, 52 Ohio St. 103, 39 N.E. 195 (1894). See also *Hull v. Roseman*, 95 Ohio L. Abs. 218, 198 N.E.2d 792 (C.P. 1964), where a settlement was made during an appeal of the decision of the common pleas court in a will contest case. It was held that only those persons who were parties to the settlement were entitled to share in the proceeds of the settlement.

such persons is an agreement not to contest³⁶ entered into by one or more prospective contestants, the executor³⁷ and the beneficiaries under the probated will. Under this arrangement, the attorney for the executor and the beneficiaries will not have to negotiate with numerous parties, and the possibilities of protracted litigation³⁸ are greatly diminished.

The agreement should contain the following: (1) a statement that a contest is threatened, since the consideration for the contract is the avoidance of the action; (2) the sum of money or other benefits to be paid; (3) the specific date of performance of the contract after the expiration of the six month period for contest provided in sections 2107.23 and 2741.09 of the Ohio Revised Code; and (4) a provision that in the event a will contest is filed by persons not parties to the agreement, then the performance of the agreement is to commence after the expiration of the time for final appeal of a verdict sustaining the will. Hence, under an agreement not to contest, the prospective plaintiffs are protected even if other parties sue to set aside the will.

Aside from avoiding unfavorable publicity and embarrassment, the settlement of a will contest before suit saves the contestant the costs of paying the fiduciary and his attorney for their services in the defense of the action, even though the will is set aside.³⁹ In a relatively small estate, the fees allowed may be disproportionately large, with the result the contestants will have defeated their own purpose.

IV. PROCEDURAL PITFALLS IN THE INITIATION OF A WILL CONTEST ACTION

After having explored all avenues of settlement without success, the attorney must be prepared to initiate an action to set aside the will

³⁶ By the weight of authority, a bona fide agreement to refrain from contesting a will by parties interested is valid. *West v. Leslie*, 21 Ohio Op. 89 (P. Ct. 1941).

³⁷ It has been held in Ohio that an executor is not a necessary party to such an agreement where no special circumstances or trusts affect him and his interest is ex officio only. *Skelly v. Graybill*, 109 Ohio App. 277, 165 N.E.2d 218 (1959). However, the executor is often a devisee or legatee or is interested in settling on behalf of the devisees or legatees, and therefore should be included in the agreement as he will make distribution from estate assets in accordance with the terms of the agreement.

³⁸ Once an action to contest a will is filed, it cannot be dismissed without a jury verdict unless all parties to the action or their counsel approve an entry of dismissal. Ohio Rev. Code Ann. § 2741.04 (Page 1953). See *Central Nat'l Bank v. Eells*, 5 Ohio Misc. 187, 215 N.E.2d 77 (P. Ct. 1965). However, it is difficult to obtain the approval of all parties or their counsel to the dismissal of an action unless they receive some benefit, pecuniary or otherwise. Usually the dissenters are those parties who are not represented by independent counsel, but who are benefiting from free services of plaintiff's attorney.

³⁹ Ohio Rev. Code Ann. § 2741.04 (Page 1953) provides that the trial court shall allow to the fiduciary and his attorney, as part of the costs of administration, reasonable compensation for services rendered. This provision was held constitutional in *Lindsey v. Markley*, 87 Ohio App. 529, 96 N.E.2d 311 (1950).

in question. Probably no other type of lawsuit is fraught with as many procedural traps. Mistakes and defects which might be cured in other actions are fatal to the will contest.

A. *Nature of Action to Contest Will*

Even though the right to contest a will has always existed in Ohio,⁴⁰ the proceedings to contest are now purely statutory.⁴¹ The provisions relating to an action for the contest of a will or codicil are mandatory,⁴² and the enjoyment of the right to maintain such an action is entirely dependent upon compliance with all statutory conditions and limitations.⁴³ Any failure to comply with the statutes extinguishes the right to contest.

B. *Mandatory Jurisdictional Requirements*

1. *Timely Initiation of Action*

One of the statutory jurisdictional conditions in a will contest action is that the right to contest must be exercised within the period prescribed by the statute.⁴⁴ It is provided that:

An action to contest a will or codicil shall be brought within six months after it has been admitted to probate, but persons under any legal disability may bring such action within six months after such disability is removed.⁴⁵

The action may be brought only "in the Court of Common Pleas of the county in which such probate was had."⁴⁶ The statutes limiting the period within which a will contest case may be initiated are not mere remedial statutes of limitations, but rather impose a condition on the right to contest.⁴⁷ Hence, six months after a will is admitted to probate, the right to contest is extinguished by lapse of time and the court loses jurisdiction over the subject matter of the action. This jurisdictional defect is properly attacked by a motion to dismiss.⁴⁸ As an exception

⁴⁰ *Mosier v. Harmon*, 29 Ohio St. 220 (1876).

⁴¹ *Andes v. Shippe*, 165 Ohio St. 275, 135 N.E.2d 396 (1956). The statutes regarding will contests are Ohio Rev. Code Ann. §§ 2107.23 and 2741.01 (Page 1953). For a discussion of the history of a proceeding to contest a will in Ohio see *Slemmons v. Toland*, 5 Ohio App. 201 (1916).

⁴² *Case v. Smith*, 142 Ohio St. 95, 50 N.E.2d 142 (1943).

⁴³ *Gravier v. Gluth*, 99 Ohio App. 374, 119 N.E.2d 663 (1954), *aff'd* 163 Ohio St. 232, 126 N.E.2d 332 (1955).

⁴⁴ *Donovan v. Decker*, 98 Ohio App. 183, 122 N.E.2d 501 (1953). The jurisdictional requirement relating to capacity to sue has previously been considered. See text accompanying notes 1-23 *supra*.

⁴⁵ Ohio Rev. Code Ann. §§ 2741.09, 2107.23 (Page 1953).

⁴⁶ Ohio Rev. Code Ann. § 2741.01 (Page 1953).

⁴⁷ *Woodruff v. Norvill*, 91 Ohio App. 251, 107 N.E.2d 911 (1951).

⁴⁸ *Christensen v. Maxen*, 29 Ohio L. Abs. 219 (Ct. App. 1938).

to the limitation period, it is provided by statute⁴⁹ that a person under legal disability may bring a will contest action within six months after removal of the disability.⁵⁰ In *Powell v. Koehler*⁵¹ the supreme court held that this savings clause inures to the benefit of all those interested in the estate; for the will, being an entirety, is wholly inoperative when set aside at the suit of any party.

2. Joinder of Necessary Parties

(a) *Statutory Provisions*

Another mandatory jurisdictional requirement in a will contest action is that all necessary parties must be named in the petition and joined either as plaintiff or defendant prior to the expiration of the period of time set forth in the statute of limitations.⁵² In this regard, necessary parties are defined as "All the devisees, legatees, and heirs of the testator, and other interested persons, including the executor or administrator."⁵³ Much of the litigation concerning the failure to join necessary parties deals with application of the terms "heirs" and "other interested persons," as well as with problems concerning the executor or administrator.⁵⁴

(b) "Heirs"

Within the meaning of Ohio Revised Code section 2741.02, the term "heirs" is a generic term embracing not everyone who is named in the statutes of descent and distribution, but only those who take in the situation existing at the death of the testator.⁵⁵

Perhaps the most subtle pitfall in the application of the term "heirs" comes to the fore where there is a possibility of a "half-and-half"⁵⁶ implication should the decedent die intestate. In *Kluever v.*

⁴⁹ Ohio Rev. Code Ann. §§ 2741.09, 2107.23 (Page 1953).

⁵⁰ Legal disability is defined as including persons of unsound mind, persons in captivity and persons under guardianship of the person or estate. See Ohio Rev. Code Ann. § 2131.02 (Page 1953).

⁵¹ 52 Ohio St. 103, 39 N.E. 195 (1894).

⁵² *Kluever v. Cleveland Trust Co.*, 173 Ohio St. 177, 180 N.E.2d 579 (1962). See Note, 19 Ohio St. L.J. 772 (1958).

⁵³ Ohio Rev. Code Ann. § 2741.02 (Page 1953).

⁵⁴ The categories of legatees and devisees generally do not present difficult problems, as the identification of individuals in these capacities can be ascertained from the will. But see *Leedy v. Cockley*, 14 Ohio C.C.R. (n.s.) 72, 22 Ohio C. Dec. 299 (Cir. Ct. 1911), in which the court held that a remainderman is a devisee and, therefore, a necessary party defendant. See also *Kellough v. Moses*, 32 Ohio App. 49 (1920) (contingent remainderman is merely a proper party).

⁵⁵ *Bussell v. Cline*, 10 Ohio Op. 2d 481, 161 N.E.2d 655 (C.P. 1959).

⁵⁶ Ohio Rev. Code Ann. § 2105.10 (Page 1953).

The Cleveland Trust Co.,⁵⁷ it was discovered during the course of the trial that a son of the deceased former spouse of the testatrix, who died without issue, would under the half-and-half statute inherit part of the decedent's estate if it were determined that the decedent had died intestate. It was further discovered that the plaintiff knew this stepson quite well. The stepson had not been made a party to the lawsuit. At that point a motion to dismiss was sustained by the trial court. In affirming the judgment below, the supreme court pointed out that it made no difference if the testatrix had executed prior wills, because under Ohio law one who inherits by reason of the half-and-half statute is an heir of the testator, and as such, *must* be made a party defendant in an action to contest the will.

The requirements of the statute have been construed to preclude an heir-at-law, not named in the petition, from filing an entry of appearance in an attempt to vitalize a defective petition.⁵⁸

As a matter of practice, if accurate definite information cannot be obtained as to the decedent's heirs, it is advisable to follow the statutory procedure for naming as defendants and securing publication service upon the decedent's unknown heirs, devisees and legatees.⁵⁹

(c) "Other Interested Persons"

In determining whether a specific party is an "other interested person" and thus a necessary defendant in a will contest action, the courts have taken the position that there is no distinction between the character of interest necessary to support the right to contest and the character of interest held by one required to be made a party defendant in a will contest.⁶⁰ In either case, there must be a direct pecuniary interest in the will at the time of the testator's death.⁶¹

It has previously been suggested that a beneficiary under a prior

⁵⁷ 173 Ohio St. 177, 180 N.E.2d 579 (1962).

⁵⁸ *Williams v. Wilfong*, 114 Ohio App. 183, 181 N.E.2d 314 (1961). In *McKinney v. McKinney*, 115 Ohio App. 379, 185 N.E.2d 319 (1960), several of decedent's heirs-at-law were joined as plaintiff without their consent. A motion to dismiss these parties as plaintiff was granted. Although the court did point out that these heirs could have been joined as defendants, there was no decision by the court as to whether the requirements of Ohio Revised Code Ann. § 2741.02 were met in view of such dismissal. See *Frederick v. Brown*, 102 Ohio App. 117, 141 N.E.2d 683 (1956), in which it was stated as dictum that a non-consenting plaintiff cannot withdraw from the action.

⁵⁹ This procedure is set forth in Ohio Rev. Code Ann. § 2703.24 (Page 1953). The practice of joining "unknown heirs" as parties defendant was referred to by the Ohio Supreme Court in *Fletcher v. First Nat'l Bank*, 167 Ohio St. 211, 147 N.E.2d 621 (1958).

⁶⁰ *Durbin v. Durbin*, 106 Ohio App. 155, 153 N.E.2d 706 (1957).

⁶¹ *Id.* See *Chilcote v. Hoffman*, 97 Ohio St. 98, 119 N.E. 364 (1918).

unprobated will has sufficient interest to contest a later will.⁶² Notwithstanding this fact, the beneficiaries under such prior wills as the testator may have executed are not necessary parties defendant even though they appear to have the requisite "pecuniary interest." In reaching this conclusion, the supreme court stressed the insurmountable difficulties in discovering this type of information.⁶³ More logical in view of the pecuniary interest required for a defendant is the rule that an executor named in a former will whose appointment has been revoked by codicil is not an "interested person" in an action to contest the will and codicil.⁶⁴ Such person cannot contest the codicil,⁶⁵ and, therefore, should not be deemed to be a necessary party defendant.

In *Durbin v. Durbin*,⁶⁶ the testator made a bequest of bank stock, subject to the direction that "none of said stock shall be sold by any of said legatees unless with the consent and approval of" the president of the bank. In addition to holding that the bank president was not an "interested person" because the will contest could not directly affect him, the court intimated that the interest of the bank president, if any, was void as a restraint on alienation.

As to persons who have sufficient interest to be deemed necessary parties, it has been suggested as dictum that a judgment creditor of an heir and the grantee of a devisee under the will might be parties necessary to the contest of a will.⁶⁷

The application of the "pecuniary interest" rule to cases in which the will being contested makes provision for a testamentary trust has led to constant litigation.

It appears very clear that a trustee of a testamentary trust provided for in the contested will is a necessary party defendant, whether or not such trustee has affirmatively accepted his trust. In *Martin v. Falconer*,⁶⁸ the will and codicil of the decedent were set aside. In that action, the trustees named under the decedent's will were joined as parties defendant; however, the trustees had never

⁶² See discussion *supra* note 6.

⁶³ *Machovina v. Machovina*, 132 Ohio St. 171, 5 N.E.2d 496 (1936).

⁶⁴ *Bruckmann v. Shaffer*, 108 Ohio App. 531, 155 N.E.2d 491 (1958).

⁶⁵ See *Hermann v. Crossen*, 81 Ohio L. Abs. 322, 160 N.E.2d 404 (Ct. App. 1959).

⁶⁶ 106 Ohio App. 155, 153 N.E.2d 706 (1957).

⁶⁷ *McCord v. McCord*, 104 Ohio St. 274, 135 N.E. 548 (1922). In *Sears v. Stinehelfer*, 89 Ohio St. 163, 105 N.E. 1047 (1913), the court held that a devisee of a grantee was a necessary party in a will contest action, but nevertheless indicated that the trial court had jurisdiction to try the case notwithstanding the fact that the devisee was not made a party to the original lawsuit.

⁶⁸ 10 Ohio Dec. Reprint 771, 23 Ohio W.L.B. 333 (C.P. 1890). *Accord*, *Underwood v. Hickin*, 18 Ohio L. Abs. 345 (Ct. App. 1934) (trustee also executor not named as trustee).

been appointed by the probate court. Upon securing their appointment, the trustees filed an action alleging that the judgment in the will contest was void as to them and asked the court's instructions as to the disposition of the trust res. In denying the plea of the trustees, the court pointed out that the legal title to the trust was vested in the trustees by the will, and until they declined to act, they alone could be sued as representatives of the trust.

Since the trustees of an express trust alone hold legal title to the trust estate, it follows that the beneficiaries of the trust, although proper parties to a will contest, are not parties necessary to the court's jurisdiction.⁶⁹

Where a charitable trust is provided for in the contested will, it would appear at first blush that the Attorney General is a necessary party defendant.⁷⁰ However, in a questioned decision,⁷¹ a common pleas court reasoned that the object of a will contest is to determine whether the paper writing in question is the last will of the testatrix, and not to terminate a charitable trust. Accordingly, the court concluded that the Attorney General was not required to be joined as a defendant.⁷² Nevertheless, until more persuasive authority follows the *Spang* decision, caution dictates that the Attorney General be made a defendant if charitable beneficiaries are involved in the will contest.

(d) *The Executor or Administrator*

In the will contest area, the problem which has precipitated the greatest number of supreme court decisions concerns the joinder of the executor or administrator as a defendant pursuant to Ohio Revised Code section 2741.02.

If the fiduciary is interested in the will in more than one capacity, e.g., as executor and as a devisee or legatee, it is mandatory and jurisdictional that such fiduciary be made a party and summoned in his distinctive, official capacity as executor, as well as in his individual capacity as devisee, legatee or heir, as the case may be.⁷³ The companion cases of *Peters v. Moore*⁷⁴ and *Bynner v. Jones*⁷⁵ uphold this

⁶⁹ *Elsen v. Hughes*, 87 Ohio App. 413, 94 N.E.2d 567 (1949).

⁷⁰ Ohio Rev. Code Ann. § 109.25 (Page 1953) provides that "The attorney general is a necessary party . . . in all proceedings, the object of which is to: (A) Terminate a charitable trust or distribute its assets to other than charitable donees . . ."

⁷¹ Note, 8 W. Res. L. Rev. 386 (1957).

⁷² *Spang v. Cleveland Trust Co.*, 73 Ohio L. Abs. 164, 134 N.E.2d 586 (C.P. 1956).

⁷³ *Center v. St. Peter's Episcopal Church*, 11 Ohio St. 2d 64, 227 N.E.2d 599 (1967); *Porter v. Fenner*, 5 Ohio St. 2d 233, 215 N.E.2d 389 (1966).

⁷⁴ 154 Ohio St. 177, 93 N.E.2d 683 (1950).

⁷⁵ 154 Ohio St. 184, 93 N.E.2d 687 (1950).

proposition. In the *Peters* case, the executor named in the will, who was also a legatee thereunder, declined to serve as executor. The successor executor named in the will was immediately appointed by the court. The plaintiff erroneously designated the wrong person as executor in the petition and service was had accordingly. After the six month period had passed, the court granted a motion to dismiss the petition for failure to join the appointed executor as a defendant. In *Bynner*, the named executor was properly designated as such in the body of the petition, but was served with process solely in his individual capacity as devisee and legatee. Furthermore, no precipe was filed for service upon the executor in his official capacity. It was held that the executor was not made a party and the suit was dismissed.⁷⁶

Where the executor has no relation to the estate in an individual capacity, the trend has been toward increasing liberality. The supreme court, in *Porter v. Fenner*,⁷⁷ recently overruled the case of *Mangan v. Hopkins*,⁷⁸ which had held that where the executor is named as such in the body of the petition, but not in the caption or the summons, the omission is fatal. The *Porter* case emphasized the fact that the body of the petition and not the caption determines who the parties are. Because the executor was named as such in the body of the petition, no confusion could arise as to his real capacity. Hence, the court sanctioned the procedure of allowing amendment of the precipe and the sheriff's return in order to show service upon the executor in his official capacity.⁷⁹

Even before the *Porter* decision, the harshness of *Mangan v. Hopkins*,⁸⁰ had been somewhat undermined in *Abbott v. Dawson*,⁸¹ in which the executor was described in his official capacity in the body and caption of the petition, but not in the precipe. In addition, the caption of the petition was on the summons which was duly served. Here, the court said, the record clearly showed that the executor was properly made a party in his official capacity.

A third possible problem area in complying with Ohio Revised Code section 2741.02 with respect to joining the executor or administrator is the situation where no fiduciary is acting, because the

⁷⁶ *Accord*, *Bessire v. Fisher*, 96 Ohio App. 465, 122 N.E.2d 491 (1953) (precipe could not be amended after six month period to request issuance of summons upon executor in official capacity).

⁷⁷ 5 Ohio St. 2d 233, 215 N.E.2d 389 (1966).

⁷⁸ 166 Ohio St. 41, 138 N.E.2d 872 (1956).

⁷⁹ Statutory authority for amendment of the precipe and service return was based upon Ohio Rev. Code Ann. § 2309.58 (Page 1953).

⁸⁰ 166 Ohio St. 41, 138 N.E.2d 872 (1956).

⁸¹ 167 Ohio St. 238, 147 N.E.2d 609 (1958).

executor named in the will has not applied for appointment, there is litigation regarding the appointment of the executor, or the estate has been closed.

In such case, it appears that the court will have no jurisdiction if someone is not made a defendant either as administrator or executor within six months of the probate of the will.⁸²

In *Campbell v. Johnson*,⁸³ the plaintiff was a minor who sued within six months after reaching his majority pursuant to the "savings clause"⁸⁴ for persons under disability. The estate had been closed, and the executor named in the will had been discharged many years prior to the time the will contest was filed. The plaintiff named the discharged executor as a defendant, but a motion to quash service upon him was sustained. The plaintiff thereupon secured the appointment of an administrator *de bonis non* and filed an amended petition, to which a demurrer was sustained. The appellate court reasoned (1) that the original executor, having been discharged, no longer represented the estate; and (2) it was incumbent upon the contestant to secure the appointment of an administrator *de bonis non* prior to the expiration of the limitation period. Having failed to do so, the contestant had not complied with the jurisdictional requirements of Ohio Revised Code section 2741.02 and the action failed.

It is not unusual to find that no fiduciary has been appointed by the probate court at the time the will contest is ready to be filed. This may be due to litigation regarding the appointment of the executor named in the will. There are no specific Ohio cases indicating who should be made a party defendant as executor or administrator in such a case. One possible solution is to secure the appointment of a special administrator,⁸⁵ who would be sued as the representative of the estate. In conjunction with this procedure, the executor named in the will, even though not yet appointed, should also be made a party defendant.⁸⁶

If the will has no provision for the appointment of an executor, it would seem to be incumbent upon the plaintiff to secure the appointment of an administrator against whom to proceed pursuant to the provisions of Ohio Revised Code section 2113.06.⁸⁷

⁸² *Campbell v. Johnson*, 83 Ohio App. 225, 79 N.E.2d 147 (1948). See *Martin v. Falconer*, 10 Ohio Dec. Reprint 771, 23 Ohio W.L.B. 333 (C.P. 1890). But see *Gurley v. Armentraut*, 6 Ohio C.C.R. (n.s.) 156, 27 Ohio C.C.R. 199 (Cir. Ct. 1904).

⁸³ 83 Ohio App. 225, 79 N.E.2d 147 (1948).

⁸⁴ Ohio Rev. Code Ann. §§ 2107.23, 2741.09 (Page 1953).

⁸⁵ Ohio Rev. Code Ann. § 2113.15 (Page 1953).

⁸⁶ See *Martin v. Falconer*, 10 Ohio Dec. Reprint 771, 23 Ohio W.L.B. 333 (C.P. 1890).

⁸⁷ In *Wrinkle v. Trabert*, 174 Ohio St. 233, 188 N.E.2d 587 (1963), it was held that where one has a claim against an estate, it is incumbent upon him, if no administrator

V. SERVICE OF PROCESS: SAVINGS CLAUSE REGARDING
COMMENCEMENT OF ACTION

A. *Application of Ohio Revised Code Section 2305.17*

As has been previously intimated, merely naming in the petition all necessary persons as plaintiff or defendant in the will contest does not confer jurisdiction upon the court. In a will contest, as in other civil actions, a person is joined as a party defendant only when summons is issued and served upon him.⁸⁸ It was thought at one time that the commencement of will contest actions for purposes of the statute of limitations required not only that summons be issued but that it thereafter be served within the six month limitation period as to all defendants.⁸⁹

It now appears clear that the curative provisions of Ohio Revised Code section 2305.17 (Page 1953) apply to will contest actions.⁹⁰ Under this statute, an action is deemed commenced, even though all defendants are not served within the period of limitation, provided that the conditions of the statute are met. Ohio Revised Code section 2305.17 was amended in 1965; however, for purposes of this article the statute will be analyzed in its present form as well as in its operation prior to amendment.

B. *Unity of Interest Rule*

Prior to October 30, 1965, an action was commenced within the context of Ohio Revised Code section 2305.17 (Page 1953) "as to each defendant, at the date of the summons which is served on him or on a codefendant . . . united in interest with him." The statute further provided that:

within the meaning of such sections, an attempt to commence an action is equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt is followed by service within sixty days.

The interpretation of this statute is still important because it applies to actions filed prior to October 30, 1965,⁹¹ many of which are still pending in the courts.

The unity of interest rule means in substance that for purposes of

has been appointed, to procure the appointment of an administrator against whom he can proceed.

⁸⁸ *McKelvey v. McKelvey*, 90 Ohio App. 563, 107 N.E.2d 555 (1951).

⁸⁹ *Sours v. Shuler*, 42 Ohio App. 393, 187 N.E. 908 (1932).

⁹⁰ See *Gravier v. Gluth*, 163 Ohio St. 232, 126 N.E.2d 332 (1955); *Cook v. Sears*, 9 Ohio App. 2d 197, 223 N.E.2d 613 (1967).

⁹¹ *Cook v. Sears*, 9 Ohio App. 2d 197, 223 N.E.2d 613 (1967).

service of summons, members of the separate classes of persons designated in Ohio Revised Code section 2741.02 as necessary defendants in a will contest are united in interest with each other, but not with members of another class.⁹² Hence, under this rule, a will contest action is properly commenced by (1) filing the petition naming all necessary defendants within six months of probate;⁹³ (2) filing therewith a precipe requesting that summons issue;⁹⁴ and (3) procuring service of summons upon one member of each class.⁹⁵

In application of this rule, the courts have reasoned that co-defendants are united in interest only when they are similarly affected by the determination of issues in an action. It therefore follows that an executor named in the will is not united in interest with the heirs and devisees,⁹⁶ and service of summons on the devisees, one of whom is the executor, does not constitute the commencement of the action against the executor as such.⁹⁷ Similarly, the sole beneficiary under a will who is neither an heir-at-law nor next-of-kin of the decedent is not united in interest with decedent's heirs-at-law;⁹⁸ nor is a legatee who is not an heir or next-of-kin united in interest with co-legatees who are next-of-kin.⁹⁹ On the other hand, the legatees and devisees constitute one class united in interest so that service of process upon one of them commences the action as to all in that class.¹⁰⁰

As attested by the great number of reported decisions, the unity of interest rule caused particular difficulty in the will contest area, and its application resulted in many litigants losing their day in court on procedural technicalities.

C. Amended Ohio Revised Code Section 2305.17

All references to the concept of unity of interest have been deleted from Ohio Revised Code section 2305.17, as amended (effective

⁹² Case v. Smith, 142 Ohio St. 95, 50 N.E.2d 142 (1943).

⁹³ Ohio Rev. Code Ann. §§ 2741.09, 2107.23 (Page 1953).

⁹⁴ Robinson v. Commercial Motor Freight, Inc., 174 Ohio St. 498, 190 N.E.2d 441 (1963). The rule of the *Robinson* case is now incorporated in Ohio Rev. Code Ann. § 2305.17 (Page 1953).

⁹⁵ Prior to October 30, 1965, under Ohio Rev. Code Ann. § 2305.17 (Page 1953), the plaintiff, if diligent in his efforts, had sixty days within which to procure service. Failure to effect service within such period of time is fatal. See *Mason v. Waters*, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966), noted in 28 Ohio St. L.J. 558 (1967).

⁹⁶ McCord v. McCord, 104 Ohio St. 274, 135 N.E. 548 (1922).

⁹⁷ Woodruff v. Norvill, 91 Ohio App. 251, 107 N.E.2d 911 (1951).

⁹⁸ Case v. Smith, 142 Ohio St. 95, 50 N.E.2d 142 (1943).

⁹⁹ Staley v. Sheck, 99 Ohio App. 242, 133 N.E.2d 189 (1954).

¹⁰⁰ *Draher v. Walters*, 130 Ohio St. 92, 196 N.E. 884 (1935), overruled on other grounds, *Peters v. Moore*, 154 Ohio St. 177, 93 N.E.2d 683 (1950).

October 30, 1965). In essence an action is now commenced if service is obtained on all defendants within one year after the filing of the petition accompanied by the precipe or an affidavit for service by publication, as the case may be. Presumably, under the amended statute, the proper joinder of necessary defendants is accomplished by service of summons on all defendants within the one year period. No other restrictions or limitations appear on the face of the statute. It is anticipated that the change in this statute will not only clarify the law, but will also limit greatly the number of will contest cases which are dismissed for want of jurisdiction for failure to effect prompt service of summons upon one member of each class "united in interest."

VI. CONCLUSION

When a will contest is filed, a very significant step has been taken. Family factions are embroiled in bitter litigation, often without good cause. The attorney's duty is to discourage a contest if he does not honestly believe that he can produce sufficient evidence to get the case to a jury. In a landmark case concerning the validity of an *in terrorem* clause, the decedent left the majority of her estate to a stranger rather than to her nephew. The nephew alleged fraud and undue influence, evidence of which the court found to be entirely lacking. The court, in deciding that the *in terrorem* clause worked a forfeiture of the nephew's inheritance under the will, made the following observation:

Studies which have been made show that only a very small percentage of will contests made on the grounds of defective execution, mental incapacity, or undue influence are successful; and the public interest in freeing such contests from the restraining influence of conditions like that here involved seems of little importance compared with enforcing the will of the testator that those who share in his bounty shall not have been found guilty of besmirching his reputation or parading the family skeletons after his death.¹⁰¹

¹⁰¹ *Barry v. American Security & Trust Co.*, 135 F.2d 470, 473 (1943).